APPEAL NO. 93147

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993). On January 27, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant (claimant) was an employee of the employer but that his injury was not compensable because he was not engaged in any activity that had to do with the work of his employer while going to work from his dwelling. Claimant asserts that certain findings of fact and conclusions of law that address whether claimant was in the scope of employment when injured are in error and maintains that the findings of fact are not sufficient to support the decision. Respondent (carrier) replies that the evidence sufficiently supports the decision.

DECISION

Finding that the decision is supported by sufficient findings of fact and sufficient evidence of record, we affirm.

The employer in this case is a "credit TV appliance furniture business" owned by the son of the claimant. The owner testified that from time to time some people do not make payments on the property purchased from his establishment. Attempts are made to obtain payment, but some merchandise must be retrieved. He further testified that claimant is in charge of collections and works without set hours. In the owner's opinion, it would not be unusual for the claimant to use a motorcycle to make collections. (There was an issue at the hearing concerning whether the claimant was an employee, but the hearing officer's decision that claimant was an employee was not appealed.)

Claimant on (date of injury), between 8:00 and 8:30 p.m., struck a guardrail and injured his left leg. He testified that he sets his own hours and that tracing furniture and/or people can often be best accomplished at night or on weekends. On the night in question, claimant said that he was trying to locate four accounts, the last one being that of (KJ). He also said that KJ had moved from her place of residence at South Point on Virginia, but he had gone there to try to learn her current address. From there he went to his residence to have "a little supper". From that point he said he was then driving back to the warehouse when he had the accident. He acknowledged that his coworkers were not at the warehouse at that time, but he was going to check merchandise that apparently would be delivered the next day. He marked four points on a map of the city, in evidence, with "A" being the SP apartments; "B", his apartment; "C", the warehouse; and "D" the site of the accident. An almost straight line could be drawn from a southwest point to a northeast point on that map that would include all points--"B" would be on one side of the southwest point and "D" a short distance away on the other side of the southwest point. "C" is at the northeast end of the line, with "A" being almost at the midpoint of the line. The claimant agreed that if he went directly from where he says he was looking for KJ to the warehouse, he probably would not have been at the site of the accident.

Claimant also called (SLB) to testify. She said she had been working with claimant for a year. She described his collection work and stated that evenings and weekends were opportune for success. Prior to hearing of the accident in question, however, she had never heard of claimant using his motorcycle to do collections.

The carrier called KJ. She testified that in March 1992, prior to the accident of (date of injury), she had moved from the SP apartment. She added that her payments on furniture purchased from the employer were irregular, but that when she moved from SP she had notified the employer of her new address. She stated that men from the employer had been to her SP address and two other men from the employer came twice to her new address to discuss her payments prior to (date of injury). She testified that the employer had also sent mail to her "directly" to the new address. She testified that claimant had never been with any of these men at her respective addresses. She later moved again to join her fiancee and future husband and also notified the employer of that change of address. She had received mail there from the employer, but does not believe that anyone had come there. She added that when people from the employer did come to see her, it was always before 5:00 p.m. She gave up most of the furniture voluntarily to the employer and admitted that she was delinquent at that time and that she had written checks which were not backed by sufficient funds.

Claimant asserts that the finding of fact that claimant was not directed to proceed as he did is incorrect and points to the "special mission" doctrine as stated in Shubert v. Fidelity & Casualty of New York, 467 S.W.2d 662 (Tex. Civ. App.-Houston [1st Dist] 1971, writ ref'd n.r.e.) That case involved a man who got to work too early and was crossing the street to get something to eat when injured. The lower court directed a verdict for the carrier from which Shubert appealed. The court said that generally questions of course of employment are fact questions for the trier of fact, but in this instance affirmed saying that as a matter of law Shubert was on a personal mission. The court in rationalizing the case did refer to the point made by appellant, namely, that an injury off premises incurred while acting at the express or implied instruction of the employer can be compensable. In referring to that rule, however, the Shubert court compared its facts to Janak v. TEIA, 381 S.W.2d 176 (Tex. 1964) and pointed out that in Janak the ice water obtained, off the direct route, was for all the employees and that the employer had paid for the ice. The court stated, "[h]ere, the trip for coffee was solely personal, and not to benefit all the employees." Claimant then states that the correct rule is found in Davis v. General Accident Fire & Life Assurance, 127 S.W.2d 526 (Tex. Civ. App.-Beaumont 1939, no writ). The appeal describes that rule as, "[i]f an employee's work takes the employee outside the usual business premises, an accident on the return to work is compensable unless there has been a deviation solely for the benefit or convenience of the employee." (emphasis added). This case also involves an instructed verdict for the carrier which the reported opinion affirms, resulting in another ruling as a matter of law. Mr D delivered papers for his employer. On the way back from a delivery, he performed acts related to bread and milk deliveries for another employer. While the

court said that at the time of the accident, Mr D was not engaged in any duty to the paper company and was acting solely for his own benefit, it announced the rule as follows:

> While the rule is ordinarily to the effect that if an employee is sent on a mission by his master, that he is considered an employee while returning, if he does not step aside from his employment and engage in some enterprise for his personal profit or pleasure, and would be entitled to compensation if injured while on the return trip, but if the employee turns away from the course of his employment and engages in some act not in the usual course of his employment, and while in so doing he is injured, then he cannot recover.

(We observe no use of the word "solely" in this rule.)

While the Shubert case, *supra*, in referring to implied instructions in Janak (to deviate from the normal route) in order to carry out the stated instruction to get ice water for all the employees, does not provide a basis for claimant to prevail regarding the facts in the case on appeal, it does state the prevailing view in these cases--that the decision as to course and scope and also, whether there has been a deviation that would defeat compensability, is one for the trier of fact to decide. The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. The Appeals Panel in Texas Workers' Compensation Commission Appeal No. 92169, dated June 17, 1992, and No. 92250, dated July 29, 1992, examined health and comfort questions in regard to deviation and also considered whether certain "reasonable" departures would defeat compensability, but each time the opinions affirmed on the basis that questions of deviation are for the trier of fact to decide. In referencing the above Appeals Panel cases, we would point out that No. 92169 cited Mapp v. Maryland Casualty Co., 730 S.W.2d 658 (Tex. 1987). The Supreme Court there remanded on the basis that a question of fact was presented; therefore the summary judgment entered for the carrier was inappropriate. The facts in that case included that claimant was working on the day in question in a town nearby the one in which she lived and worked the majority of her time. She was injured while leaving the premises to go to lunch; in a dissent to the court of appeals affirmance of the summary judgment (Mapp v. Maryland Casualty Co., 725 S.W.2d 516 (Tex. App.-Beaumont 1987), the use of summary judgment was questioned and the fact that claimant needed to eat during "a longer, 9-hour day" was mentioned. Appellant in the case before us provided no evidence of the length of time he had spent working (he set his own hours) prior to deciding to eat at approximately 8:00 p.m. Under the cases and Appeals Panel decisions cited the hearing officer had the responsibility to decide whether claimant had deviated from the course and scope of his employment; the facts of record were sufficient to support the hearing officer's decision that claimant was not in the course of employment when injured and to sustain findings of fact that support that decision. *Also see* Lesco Transportation v. Campbell, 500 S.W.2d 238 (Tex. Civ. App.-Texarkana 1973, no writ), in which the court said, "[u]nless the proof is such that only one conclusion can be reasonably drawn from it

by reasonable minds, deviation from course and scope of employment is a question of fact to be determined by the trier of facts."

Claimant also states that the findings of fact are conclusionary and not supported by underlying findings of fact. It cites cases under the Administrative Procedure and Texas Register Act (APTRA) TEX. REV. CIV. STAT. ANN. arr. 6252-13a (Vernon Supp. 1993), which will be discussed later, and a pre-APTRA case, Miller v. Railroad Commission of Texas, 363 S.W.2d 244 (Tex. 1963). In that case, the Supreme Court ruled that the finding of fact was inadequate after noting that the legislation provided that the railroad commission had authority to issue certificates for routes when such was "established by substantial evidence: (1) that the services and facilities of the existing carriers serving the territory or any part thereof are inadequate; (2) that there exists a public necessity for such service; and, (3) the public convenience will be promoted by granting. . . ." The legislation also set forth that the certificate shall be:

> void unless the Commission shall set forth in its order full and complete findings of fact pointing out in detail the inadequacies of the services and facilities of the existing carriers, and the public need for the proposed service. (emphasis added)

The concurring opinion in that decision emphasized the legislation calling for "full and complete findings of fact" and pointed out that the railroad commission had used a "printed form containing `standard' findings of fact". Since the 1989 Act only provides for a decision "that includes: findings of fact and conclusions of law;", the Miller case, *supra*, is distinguishable and not controlling.

Since APTRA, a leading case in regard to findings of fact is Texas Health Facilities Commission v. Charter Medical-Dallas, 665 S.W.2d 446 (Tex. 1984). Appellant also cited this case. It will be examined although it arises under APTRA and the 1989 Act, at Article 8308-6.32, states that sections 15 through 23 thereof do not apply to the hearing in question. (Section 16 of APTRA addresses findings of fact and says, in part:

> Findings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings.)

Charter Medical, *supra* did state that underlying findings of fact were necessary in the case before the court and set forth "suggestions" for findings of fact.

Since Charter Medical, *supra*, Galveston County v. Texas Dept of Health, 724 S.W.2d 115 (Tex. App.-Austin 1987, writ ref'd n.r.e.) considered whether the findings of fact set out in an order of that department were sufficient. The matter in question stemmed from

whether an application for a waste system should be approved or not. The court referred to basic findings of fact as beneficial, but then observed:

> the Supreme Court of Texas has held, in Texas Health Facilities Commission v. Charter Medical-Dallas, Inc., 665 S.W.2d 446 (Tex. 1984) that findings of underlying fact need not be included in the agency's final order except where an "ultimate fact finding embodies a mandatory fact finding set forth in the relevant enabling act" or when the ultimate fact finding represents a criterion "that the legislature has directed the agency to consider in performing its function." 665 S.W.2d at 451. In the present case, the relevant "enabling act" or constitutive statute, art. 4477-7, *supra*, does not itself require that the Department make any particular finding of ultimate fact before issuing a permit nor does it direct that the Department consider any particular criterion before issuing the permit. Thus, under the Supreme Court's holding in Charter Medical, the Department was not obliged to make any findings of basic fact at all by reason of APTRA § 16(b).

With the cases limiting the requirement for basic findings of fact under APTRA as they do, it is very questionable whether hearings under the 1989 Act would be required to set forth basic findings of fact given the 1989 Act's limited instructions as to findings of fact regarding any "particular finding of ultimate fact"--even if the 1989 Act were subject to relevant parts of APTRA.

Not being subject to relevant parts of APTRA, the 1989 Act sets forth no requirements as to how detailed "findings of fact" must be. The findings of fact that address the issue of compensability are as follows:

FINDINGS OF FACT

> 7.On (date of injury), claimant was not engaged in collecting delinquent accounts for (employer).
>
> 8.On (date of injury), claimant. . .was not engaged in any activity of any kind or character that had to do with or originated in the work, business, trade, or profession of (employer's) when he had the motorcycle accident.
>
> 9.On (date of injury), the motorcycle accident occurred when claimant was not engaged in or about the furtherance of the affairs or business of (employer).

10.On (date of injury), claimant was transporting himself to work from his apartment to (employer) when he had the motorcycle accident.

11.On (date of injury), claimant's transportation to work was not furnished as a part of his employment contract and was not paid for by (employer).

12.On (date of injury), claimant's means of transportation to work was not under the control of (employer).

13.On (date of injury), claimant was not directed in his employment by (employer) to proceed from one place to another place.

These findings of fact are sufficient under the 1989 Act upon which to base the decision. We would also point out that judicial review of a final decision of the Appeals Panel on compensability is not conducted as a review of the record on the basis of whether there was substantial evidence to support the decision. It is a limited de novo proceeding. *See* Article 8308-6.62 of the 1989 Act. It can be argued therefore that the need for detailed basic findings of fact is not as great as it could be if judicial review were based on the record.

The decision and order are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge